

1803. March 9.

DAVIDSON *against* ELPHINSTONE.

THE Honourable Charles Elphinstone Fleeming, claimed to be enrolled at the meeting for electing a representative in Parliament for Stirlingshire, held on 19th July 1802, produced the following titles:

1st, A charter of resignation under the great seal, in favour of Robert Hill, of the lands of Easter Glenboig *alias* Enboig. 2d, Disposition by Hill in Elphinstone's favour, of the said lands of Glenboig. 3d, Instrument of sasine following upon that charter and disposition; and 4th, An extract of a retour of the service of Sir James Edmonstone of Duntreath, to his father in these lands, dated 21st April 1615, the descriptive clause of which is in these words:

“ Qui jurati dicunt, quod quondam Willielmus Edmestoun de Duntreath, pater domini Jacobi Edmestoun, nunc de Duntreath, militis, obiit ultimo vestitus et sasitus ut de feodo ad pacem et fidem S. D. N. Regis, de totis et integris quinq. mercatis terrarum de Eister Glenboig *alias* Eneboig, cum molendino, terris molendinariis, astrictis multuris ejusdem, et suis pertinentiis quibuscunq., jacen. infra vicecomitatum de Striviling, *una cum officio* Coronatoris dict. vicecomitatus de Striviling.” The *valent* clause, again, is in these words: “ Et quod dict. terræ de Eister Glenboig, *cum* molendino, terris molendinariis, astrictis multuris ejusdem, et suis pertinen., *una cum officio* Coronatoris prædict., *valent* nunc per annum summam decem librarum monetæ regni Scotiæ, et quod valuerunt tempore pacis summam quinq. mercarum monetæ prædict.”

Harry Dadvidson one of the freeholders, objected, that the retour did not afford sufficient legal evidence of the separate old extent of the lands of Easter Glenboig, exclusive of the office of coroner or crownarie of the shireffdom of Stirling, which last being now abolished or extinct, was not claimed upon by Mr Elphinstone.

The freeholders having repelled this objection, Mr Davidson complained to the Court; and

Pleaded; The statute 1681, c. 21. which forms the basis of the election-law of Scotland, provides that none shall be entitled to vote in the election of Members of Parliament, but those who are publicly infeft in property or superiority, and in possession of a forty shilling land of old extent, holden of the King, or Prince, distinct from the feu-duties; or, where the old extent does not appear, who is infeft in lands amounting to L. 400 Scots of valued rent. It is now fixed by 16th George II. c. 11., that a retour prior to 16th September 1681, is the only evidence of old extent.

The import of the *valent* clause must decide this case, as its peculiar business is to answer this head of the brief, what the old and new extent of the subject retoured is? The office of Coroner is mentioned as one of the subjects in which Sir James was to be served heir to his father, and is particularly in-

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cluded in the *valent* clause along with the lands, as forming part of the old extent; but as this office, although formerly of great importance, is now a mere name, and incapable of possession, there being neither duty to perform, nor emoluments to receive, it must therefore be laid out of the question. The old extent of the lands alone cannot amount to five merks, and therefore do not afford a freehold qualification.

The office of Coroner was formerly of great importance. He was intrusted with the discharge of some duties essential to the due execution of the law, and enjoyed various fees and emoluments, fixed either by practice, law, or immemorial consuetude. This was the nature of the office at the time of the general valuation, which goes by the name of the old extent. From stat. Malc. II. c. 3, the Crouner, it appears, was an officer as well known as the Sheriff; and his duty upon a crime being committed, was, after taking a summary cognition of it, to arrest the persons suspected, and to present them to the next Justice Air, in return for which he was allowed a proportion of all the amerciements and escheats which took place there; Quon. Attach.; Stat. Alex. II. In Prynne's Collections, vol. 3. p. 1051., we find an ordinance of Edward I. for settling the constitution of Scotland, which includes the Coroners, with the regulations for the due exercise of their office, which, besides showing their importance at that early period, also demonstrates that the office was held by heritable titles. There is likewise a succession of statutes relative to this office, as being important in the due execution of the law; 1436, c. 139.; 1449, c. 21.; 1487, c. 99, 101, 102, 103, 113.; 1503, c. 93.; 1528, c. 5.; 1587, c. 82.; Balfour's Prack. From Skene on Crimes, c. 12, 15, 16. we learn that this was an efficient office, with certain emoluments annexed to it in 1609. Now, the date of the retour in question is 1615. It is true, the office is now in desuetude, though it is not known when this innovation took place. During Cromwell's usurpation, all heritable offices in Scotland were abolished by 1654, c. 9. And after the act rescissory, it does not appear that the Coroners resumed the exercise of their right, which came to be gradually superseded by the extended powers of the Justices of the Peace; and, finally, by the change introduced into the administration of criminal law by the new-modelled Court of Justiciary in 1672. Mackenzie mentions, (Observations, p. 126.), that the Coroners still protested against these innovations; but their duties were held as a mere piece of form; Mackenzie's Criminal Law, p. 114. And the office itself became so entirely extinct, that, on the abolition of heritable jurisdictions, the Coronerships were allowed to remain with those that had them in their title-deeds, it being understood that it was nothing but a name without either power or emolument of any kind; Earl of Strathmore, 4th February 1748*.

The office of Coroner being granted in fee and heritage by the Crown, was thus rendered a feudal estate, subject to all the incidents and casualties which

* Not Reported, See APPENDIX.

arise from the nature of a feudal holding, in the same manner as if it had consisted of lands. All heritable offices were so; and upon the death of a crown vassal, the office could only be taken up by a service and retour, proceeding upon a brief of mortancestry; and it could be transmitted to creditors, or singular successors, according to the feudal form only; Cockburn of Langton, No 17. p. 150. Heritable offices being liable to the casualties of ward, non-entry, &c. were subject also to the extraordinary aids and taxations which were sometimes imposed in cases of urgent necessity. The valuation, called the old extent, by which at one time taxes were levied, was not confined to lands alone; even the livings of the clergy were extended; Proceedings of Parliament, 20th July 1366, in Index of Records and Charters, p. 110. And it cannot be doubted, that offices held as a patrimonial property and yielding emoluments, must have been included in the extent, and paid tax accordingly. Many retours of heritable offices *per se*, and even of this office of Coroner, containing both an old and new extent, exist.

The extents which are far below the real value, are retoured to ascertain the claim of the superior for the rents falling due during minority; and if this be not ascertained, the superior is entitled to the real value; Erskine, b. 2. tit. 5. § 37.; so that a person expeding a service to a feudal subject yielding profits, will not leave the *valent* clause defective, and retour the value only of part of the subjects. It was not unusual to retour one *cumulo* valuation of lands and an office. Douglas of Cavers was served heir to his father in the barony of Cavers and office of Sheriff of Roxburgh. The objection contended for is not a new objection, but was sustained in Murray against Clark, 14th July 1774, in Wight, p. 170.*; and in Freeholders of Lanark against Steuart, No 35. p. 8616: And it has been often found, that descriptive words in a retour cannot be founded on, *per se*, as evidence of the old extent; Sir Michael Steuart against Campbell, 22d Feb. 1745, in Wight, p. 166. No 14. p. 8574.

Answered; The retour shews the extent retoured to be the extent of the lands only, and that no part of it belonged to the office of Coroner, which, at the date of this retour, seems to have been totally insignificant; Pinkerton's History, vol. 2. p. 404. It does not indeed clearly appear that moveable property or offices were ever subject to taxation, which was properly imposed on land only; Wight, p. 160.; Law Tracts, p. 422.; Stat. 1474. c. 55.; Appendix to Wight, p. 30. When retours of heritable offices *per se* appear, which is very seldom, it is principally for the sake of ascertaining the non-entry duties due to the superior; it was but rare that any office was considered as having emoluments more than commensurate to the duties attached to it: *Valent per annum debito exercendo suo servitio*. This was sometimes mentioned in the retour, but, in general, it was held sufficient to mention the office, without adding to it any separate extent or valuation; in which case it is held *valere seipsum*, which is the general presumption of law.

The important object of the old extent, was to ascertain what each landed subject was to pay as its proportion of the land-tax, due to the sovereign or

No 29. the state ; and there could not have been comprehended under it an office which did not pay land-tax ; so that when an extent was to be put upon an office, with a reference to the rights of the superior, it was necessary to extend it separately, and not *in cumulo* with the lands, as otherwise it would have been impossible to collect the land-tax, a new process being necessary to ascertain what part of the extent applied to the taxable subject, and what to the subject which was not liable to the land-tax, but to the feudal casualties only. One or two cases perhaps may occur, where a separate valuation has been made of an office ; but in these, it is probable that there had been annexed to the office, duties or revenue out of the lands of third parties, which made it liable to pay land-tax.

But, independent of every other argument, the retour itself proves that the lands are a five merk land. The answer to the first head of the brief says so in precise terms ; *De quinque mercatis terrarum de Eister Glenboig*. Besides the landed subject with its pertinents, thus accurately described as a five merk land, the office of coroner is mentioned as being one of the subjects in which the ancestor died seised, and which the service was intended to carry ; but no value whatever is put upon it, upon the general principle *valere seipsum* ; and in the *valent* clause, the lands, with the pertinents, which had been already said to be a five merk land, and the office which had not been described as having any extent annexed to it, “ *valent nunc per annum summam decem librarum monetæ regni Scotiæ, et valuerunt tempore pacis summam quinq. mericarum monetæ prædict.*” If this last clause be ambiguous, compared with the descriptive words of the retour, the meaning is obvious ; and it is enough to discover the meaning of the retour from a consideration of the whole deed or series of deeds ; Belches against Buchanan, 1790, (*see* APPENDIX) ; Davidson against Hill, No 27. p. 8597. In Scott against Miller, 20th February 1787, No No 41. p. 8625, an objection similar to the present was repelled, as well as in Colquhoun against Voters of Dunbartonshire, 5th February 1745, No 12. p. 8572 ; Fletcher against Ferrier, 23d January 1781, No 24. p. 8593.

The Court was divided upon the question. It seemed to be the prevailing opinion, that the extents comprehended all feudalized subjects, and that reliefs were always exacted from heritable offices, as well as lands, mills, fishings, and that it comprehended not merely permanent, but even occasional rent, as coal, salt, &c. But the whole retour taken together satisfied a majority, that in this case the lands and pertinents were a five merk land, independent of the office, as mentioned in the descriptive clause, and that the office of Coroner was not meant to be extended in the *valent*.

The objection was repelled.

Act. Solicitor General Blair, M. Ross, Robertson, Bruce. Agent, Alex. Abercromby, IV. S.

Alt. H. Erskine, Campbell, Jr. Clerk, Arch. Campbell junior, Wm. Erskine.

Agent, Ro. Hill, IV. S.

Clerk, Menzies

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Fac. Col. No 96. p. 212.

* * * Affirmed on Appeal.